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Foreword to Abortion under State Constitutions: A State-by-State Analysis

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ABORTION UNDER STATE CONSTITUTIONS

A State-by-State Analysis

Paul Benjamin Linton

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FOREWORD

When we think of Constitutional Law, we typically think only of the United States Constitution. Indeed, turn to the typical college or law school text on Constitutional Law, and you will find a collection of cases from just one Court, the United States Supreme Court.

Yet the state courts make Constitutional Law all the time. And, often, what the state courts say is different from what the United States Supreme Court says. Of course, the United States Supreme Court long ago decided that it is the supreme expositor of what the United States Constitution means. But state courts have their own state constitutions, which they may interpret to grant more rights or different rights than what the federal constitution offers. As Justice Brennan remarked over thirty years ago, "state courts no less than federal are and ought to be the guardians of our liberties."¹ State jurists² and commentators³ have echoed this refrain.

The law governing abortions, like other laws, is subject to the state constitutions as well as the federal constitution. Lawyers who engage in the litigation in the trial level know that state constitutions matter. In the area of abortion law, the Supreme Court recently has taken to writing decisions that are less expansive and require that litigants have standing instead of hypothesizing circumstances that may never occur.⁴ The modern Court does not embrace facial attacks.⁵ This restraint creates a partial vacuum, which state courts rush to fill.

1. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. E.g., Stanley Mosk, *The New States Rights*, 10 CALIF. L. ENFORCEMENT 81, 81 (1976). Stanley Mosk was Justice of the California Supreme Court at the time he wrote this article.

3. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). See also, 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 1.6(c) State Court Review of State Laws (Thomson-West, 4th ed. 2007).

4. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 126 S.Ct. 961, 163 L.Ed. 812 (2006).

5. *Gonzales v. Carhart*, 550 U.S. ___, 127 S.Ct. 1610, 1631, 167 L.Ed.2d 480 (2007).

fers analyses of what are the state constitutional rights regarding abortion and what the law may come to be. The presentation strives to be objective and evenhanded.

His book should be of interest and value, to not only lawyers on both sides of the abortion debate, but also to judges considering abortion rights claims, and lawyers and non-lawyers interested in the legal issues surrounding abortion. Although this book is a work of scholarship, Mr. Linton writes in a clear style that nonlawyers should find accessible.

The Good Book tells us that there is nothing new under the sun. When it comes to abortion litigation, under the present state of the law, there is probably no argument that some litigant has not raised in some state court, and, as Mr. Linton explains in his Introduction, he discusses them all, plus others that litigants may raise in the future. His goal is to provide an informed judgment about what state courts are likely to do, after examining the state constitution text, its history, interpretation and the historical and contemporary treatment of abortion and the rights of unborn children outside the context of abortion, such as laws governing fetal homicide, wrongful death, health care laws, property law, etc.

The law's movement is sometimes difficult to predict—and those who make them tend to offer evidence of their fallibility. But, that does not mean that we should not try. The law is not random. Even if we cannot predict with confidence what a court will do, we should be able to predict with some confidence the arguments that a court will find more persuasive. Mr. Linton excels in exploring these arguments.

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